In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1558

DONALD R. McVEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A8) is reported at 436 F. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1971. A petition for rehearing was denied on March 10, 1971. The petition for a writ of certiorari was filed on April 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state search warrant, based on the sale of hallucinogenic drugs to an undercover police officer,

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was defective for want of state statutory authority, so that introduction of the fruits of the search was barred at petitioner's federal trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on a two-count information (returned in October 1969) charging that on May 17, 1968, he possessed and sold approximately fifteen capsules of STP, a hallucinogenic drug within the meaning of 21 U.S.C. 321(v)(3).[1] On June 2, 1970, he was sentenced to consecutive prison terms of one year on each count. The court of appeals affirmed, one judge concurring specially (Pet. A).

On May 13, 1968, Officer Joseph Canali, an undercover agent with the St. Petersburg, Florida police, purchased two STP tablets from petitioner at the latter's home in St. Petersburg (Tr. 68, 72, 148).[2] On May 17, 1968, on the basis of Canali's affidavit detailing the sale (Pet. A13–A14), a Florida justice of the peace issued a warrant authorizing a search of petitioner's residence for STP, for other illicit drugs and for drug paraphernalia; the warrant authorized the seizure of any such items found on the premises.[3]

On May 17, at petitioner's invitation, Officer Canali returned to the house. Petitioner and Canali went to

[1] "STP" is the popular name for methyl-dimethoxy-alpha-methyl-phenethylamine; "DOM" is the trade name.

[2] "Tr." refers to the one-volume trial transcript which we are lodging with the Clerk of the Court.

[3] We are lodging with the Clerk a copy of the warrant and the return listing the property taken.

the bedroom; petitioner there obtained fifteen STP capsules out of a Band-Aid box and sold them to Canali for $600. The marked currency by which Canali paid for the tablets was then divided between petitioner and a third party who was present during this transaction. This third party took the Band-Aid box to the den of the house. Shortly thereafter, acting by prearrangement with Canali, other local officers knocked at the door of the dwelling. When petitioner responded, he was informed that they had a search warrant; they then entered the house and arrested him. After petitioner was told that he was under arrest for sale of STP, the arresting officer recovered $260 in marked bills from petitioner's person. At that time, the other person present ran out of the house and was arrested by Canali (Tr. 84–85, 122–123).

In a subsequent search of the house, the officers found the Band-Aid box which contained additional STP capsules. At trial, the marked currency, the STP tablets sold to Canali on both occasions and the remaining tablets found in the Band-Aid box were introduced into evidence. In addition to Canali, four officers who executed the search warrant and arrested petitioner appeared as government witnesses.

ARGUMENT

The court below rightly concluded that the search and seizure was valid under state law and therefore that the items were properly admitted at petitioner's federal trial.[4] As its opinion shows, the warrant to

[4] Had this been a federal arrest and seizure from the outset, it plainly would have been compatible with the requirements of the Fourth Amendment irrespective of any warrant procedure. The

search petitioner's home comported with the requirements of the Florida statute delineating the conditions which permit the search of a private dwelling (Pet. A4–A6). Nor did the dismissal of the state prosecution taint the admissibility of this evidence in a federal court. The state proceedings were not terminated by any invalidity in the warrant; on the contrary, the state court specifically denied a motion to suppress the fruits of the search and seizure here in issue, finding that the warrant had been lawfully issued and properly executed.[5] We are advised by the United States Attorney that the state prosecution was dismissed for reasons wholly unrelated to the search (see the government's original brief in the court of

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purchase of the hallucinogenics on May 13 and 17, 1968, would have required no preexisting warrant authority. *Lewis* v. *United States*, 385 U.S. 206; see also, *United States* v. *White*, No. 13, this Term, decided April 5, 1971 (slip op. 4). Moreover, these events occurred prior to this Court's decision in *Chimel* v. *California*, 395 U.S. 752—deemed nonretroactive in *Williams* v. *United States*, No. 81, this Term, decided April 5, 1971. Accordingly, the agent making the purchase could have then-and-there arrested petitioner and seized the remaining drugs and the marked money (see Pet. A8).

[5] Petitioner also seems to be claiming that the dismissal of the state prosecution denied him a speedy trial. However, he makes no claim of specific prejudice; nor is there any suggestion of governmental overreaching or purposeful acts of delay. Cf. *Dickey* v. *Florida*, 398 U.S. 30. Nor, indeed, was the issue raised below until the petition for rehearing. In these circumstances, we perceive no reason to defer disposition of the instant petition until this Court decides *United States* v. *Marion*, No. 810, this Term.

appeals, particularly at pp. 11–13, which reprints the order of the state judge sustaining the warrant; we are lodging a copy of that brief herewith).

Petitioner argues, however, that the search was invalid under state law because the sale or possession of STP was not unlawful under the Florida Drug Abuse Law at the time that law was enacted, and therefore could not be made unlawful under state law by subsequent changes in federal law. Although the Florida statute extends its prohibitions to cover "any other drug to which the drug abuse laws of the United States apply * * *" (Section 404.01(3)), petitioner argues that the Florida legislature has no power generally to delegate to federal authorities authority to designate the types of hallucinogenic drugs which might in the future fall within the bar of its statute.

This contention presents no substantial federal question. The Florida statute—effective July 1, 1967—encompasses a wide variety of drugs; the chemical structure of some are almost identical to the one in issue here. The present compound was brought within the ambit of federal law in February 1968. The state legislature's reliance upon the expertise of the federal government to identify closely similar hallucinogenic drugs discovered by ongoing research is entirely legitimate and hardly comparable to the situation where the state legislature has attempted to authorize the federal government to fix substantive guidelines relating to matters of state policy. Cf. *Florida Industrial Commission* v. *State*, 21 So. 2d 599, 603, relied upon by petitioner. No issues of lack of notice or other questions of fairness are

involved. Cf. the Assimilative Crimes Act, 18 U.S.C. 13, sustained in *United States* v. *Sharpnack*, 355 U.S. 286.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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